

IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,)	
)	
Respondent,)	
)	
vs.)	No. SC95110
)	
DANIEL HARTMAN,)	
)	
Appellant.)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF JASPER COUNTY, MISSOURI
29TH JUDICIAL CIRCUIT
THE HONORABLE GAYLE L. CRANE, JUDGE

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

Appellant, Daniel Hartman, appeals his convictions of second degree murder, Section 565.021,¹ armed criminal action, Section 571.015, and first degree burglary, Section 569.160, following a jury trial in Jasper County, Missouri. The Honorable Gayle L. Crane sentenced Daniel to two concurrent life sentences and a concurrent fifteen year term of imprisonment, respectively (LF 145-146).²

This Court transferred Daniel's case pursuant to Rule 83.04 after an opinion by the Missouri Court of Appeals, Southern District. This Court has jurisdiction pursuant to Article V, Section 10, of the Missouri Constitution.

¹ All statutory references are to RSMO 2000.

² The record on appeal is a transcript (TR), legal file (LF) and exhibits (EX).

STATEMENT OF FACTS

The State charged seventeen-year-old Daniel Hartman with the first degree murder of Jacob Wages, armed criminal action and first degree burglary (LF 21, 23-24, 27).

Four co-defendants were also charged in the death of Jacob Wages: Jonathan Taylor (JT); Elijah Taylor (Eli); Marcus Stephens (Marcus); and Cody Stephens (Cody).³

Jacob Wages died from a single gunshot wound to the chest (TR 327, 359). He was found on the floor of his apartment, near his bed (TR 302). The wound was not from a contact or close range shot (TR 357, 388). Three bullets were found in the apartment: one in Jacob's chest, one in the wall and one in the floor (TR 331-332). The police determined that only three bullets were fired inside the apartment (TR 332).

The version of events presented at trial diverged in certain respects; therefore, the testimony of each witness will be set forth as it was introduced at trial:

Cody Stephens

Cody lived in Parsons, Kansas, but on July 5-6, 2012, he visited Joplin, Missouri (TR 390). He had attended high school in Joplin and he was one of JT's best friends (TR 390-391, 430). Cody went to JT's apartment on July 5th, and JT asked him to spend the night there (TR 392). JT lived with his girlfriend, Brittany Copeland (TR 392). JT's brother, Eli, was also at the apartment, along with Marcus and Daniel (TR 392).

³ JT and Eli are brothers (TR 392). Marcus and Cody have the same last name, but they are unrelated. Because of the similarities in last names among the co-defendants, this brief will use the first names of all parties to avoid confusion. No disrespect is intended.

Cody testified that on the evening of July 5th, JT, Marcus and Daniel were using drugs (TR 393, 430). Cody denied using any drugs or alcohol (TR 394, 429). At some point, JT was trying to figure out how to get more money for drugs (TR 394). They discussed who they could rob, and JT suggested that they could rob Jacob Wages (TR 394, 430, 473). Cody did not know Jacob, but JT or Eli knew him from buying drugs from him in the past (TR 395). They decided that they were going to go to Jacob's house and take drugs and money from him (TR 395).

JT called Travis Morris, who bought drugs from Jacob (TR 395). Travis said that he could get JT into Jacob's house and they could figure out who was in the house (TR 395). Travis called JT back about 20 minutes later; he told JT that Jacob and his girlfriend were both asleep in the house (TR 395). Travis came over and picked up JT; another one of JT's friends, Paul Pena, also came over (TR 396). Cody said that, at some point, JT, Daniel, Marcus and Eli left with Travis and Paul (TR 396). Cody claimed that he and Brittany stayed behind at JT's apartment (TR 397, 448).⁴

The group returned later and JT told Cody that Cody had to go back with them so he could get them into the house (TR 397, 448). Cody claimed that he did not want to go, but that he was forced to go (TR 397, 448). JT told him that they were afraid that if Cody did not go, he might rat them out (TR 474). Cody said that Daniel threatened him with a gun (TR 474).⁵ Cody said that he, JT, Eli, Daniel, Marcus, Travis and Paul all returned to

⁴ Initially, Cody told the police that he went with them, but stayed in the car (TR 452).

⁵ Cody initially told the police that only JT threatened him about going (TR 469).

Jacob's house (TR 398). Cody, Eli, Daniel and Marcus rode in Paul's car, and JT rode in Travis' car (TR 399-400). They parked in a nearby parking lot (TR 400).

When they arrived at Jacob's house for the second time, JT, Eli, Cody, Daniel and Marcus got out of the cars (TR 400). They hopped over a fence and went to Jacob's back door (TR 401). Cody testified that Daniel and Eli both had guns (TR402, 466). He said that Daniel had JT's gun, a .22, and Eli had a nine millimeter (TR 402). Cody knew about JT's gun because he had seen JT with the gun at the apartment earlier (TR 402). Cody said that JT gave the gun to Daniel before they left the apartment the first time (TR 432).

Cody testified that Daniel kicked open the back door,⁶ and Daniel and Eli went in first because they had guns (TR 403, 455). Cody, Marcus and JT followed them in (TR 403).⁷ They went to the front bedroom and saw Jacob and his girlfriend asleep in bed (TR 404). Marcus grabbed an assault rifle that was in Jacob's bedroom (TR 459). Daniel, Marcus and Eli tried to wake Jacob up (TR 404). Daniel told Jacob, "this is a robbery." (TR 405).

According to Cody, Jacob woke up and rushed at Daniel, Daniel and Eli pulled their guns, and someone started firing (TR 405-406, 455). He thought Eli was firing too

⁶ Cody initially told the police that Eli kicked the door in (TR 466).

⁷ Cody initially lied to the police, telling them that he did not go inside the house (TR 451-453). Cody also lied to the police at first when he told them that JT waited at the back door (TR 453).

(TR 455). After the gunfire, everyone turned and ran out of the house and back to the cars (TR 407). They returned to JT's house (TR 407).

Cody testified that Eli and Daniel were mad because they did not get anything from Jacob's house and that they did it for no reason (TR 408, 481). Cody said that Daniel told them that they needed to go back to Jacob's, but that he was not going to go back (TR 408). Cody went with JT and Eli back to Jacob's, and Paul drove them there (TR 409). Daniel stayed behind at JT's apartment (TR 485).

Cody said that when they arrived, JT looked through the window and saw that Jacob was still lying on the floor (TR 410). Jacob's girlfriend was still sleeping in the bed (TR 410). They went through the back door and started tearing the house up, searching for a black box (TR 410). Cody said that JT and Eli were pulling out all the drawers in Jacob's bedroom, but that he was just standing in the living room watching them (TR 467).

Once they found the box, they went back to JT's apartment (TR 411). Daniel was asleep and Marcus was playing a video game (TR 411). They got a hammer from Paul and popped the black box open, but there were no drugs or money inside, only a scale and some rope (TR 411). JT went into his room and did not come out until the morning; Cody went to sleep (TR 411).

The next morning, one of Eli's and JT's cousins came over (TR 412). He asked JT, "Why did you kill him?" and JT denied being involved (TR 412). Later, JT's grandfather came over and told everyone that they had to leave (TR 412). Cody was arrested later that night (TR 412). In exchange for testifying, the State agreed to let Cody

plead guilty to second degree murder and first degree burglary, with a cap of fifteen years (TR 428). Cody hoped that by cooperating he might get less than fifteen years (TR 470).

Brittany Copeland

Brittany was JT's girlfriend and she was pregnant with his children in July, 2012; they lived together at the Ambassador apartments in Joplin (TR 494-495). Eli, Marcus and Daniel came to visit on July 5th (TR 496). Brittany said that no one was doing drugs at their apartment (TR 497). At some point there was a discussion about committing a robbery and that Daniel was part of the discussion (TR 497). They were talking about robbing a guy named Jacob Wages who had drugs and money that they wanted (TR 497).

Brittany went to sleep; she did not see anyone leave (TR 498, 501). When she woke up, the only other person in the apartment was Eli and he was asleep on the air mattress (TR 498).⁸ She went back to bed, and when she woke up a second time, Eli and Daniel came in the room (TR 499). Eli flipped on the light and said "he was dead" and "we killed him" (TR 499). Brittany said that Daniel had a tattoo of a gun on his chest; he punched the gun and said that he shot him (TR 499). Brittany told Eli that he was lying and that she wanted to go back to bed; he turned off the light and left (TR 501).

Elijah Taylor

Eli is JT's brother and he lived in Tulsa, Oklahoma (TR 505-506). Daniel and Marcus also lived in Tulsa and Eli had known them for a little while (TR 506-507). On

⁸ Brittany said that she was never alone in the apartment with Cody Stephens; he was gone (TR 502).

July 4, 2012, Eli's mom drove Eli, Daniel and Marcus to JT's apartment in Joplin (TR 507).

Eli testified that on July 5th, they "chilled with some girls" and went swimming (TR 509). JT and Daniel were doing a drug called "Molly," but Eli did not know where they got it (TR 510). Eli was drinking alcohol and they were all smoking marijuana, including Cody (TR 532). Eli went to sleep (TR 510). At some point, the others woke him up to go to McDonald's and meet Travis Morris (TR 511). Eli, JT, Marcus and Daniel rode there in Paul Pena's car (TR 511). Cody was not with them (TR 516). When they got to McDonald's, Travis came up to Paul's car and Travis and JT talked about Jacob Wages and his house (TR 512). They talked about taking \$5,000 and a pound of drugs from Jacob's house (TR 513). They said that Jacob had an assault rifle and that he knew karate or boxing (TR 513).

According to Eli, when they left McDonald's, they went back to JT's apartment and JT got out of Paul's car, saying that he would wait for them to get back (TR 534). Eli said that JT did not want to go because he knew Jacob (TR 535). Later in his testimony, Eli said that JT came along, but stayed in Travis' car (TR 538).

Eli, Marcus and Daniel left in Paul's car and Travis came in his car (TR 535-537). They parked at a church parking lot and Eli, Marcus, Daniel and Travis went up to Jacob's house (TR 514). Paul waited across the street (TR 514). Travis knocked on the door but nobody answered (TR 514-515). Travis left and Eli, Marcus and Daniel went to the back door to kick it in (TR 515, 540). They started arguing because nobody wanted to kick it in, so they went back to the car and returned to JT's apartment (TR 515, 540).

JT went inside and woke up Cody so that he could kick in the door; Cody agreed to go and he got into Paul's car (TR 516, 541). Eli said that Travis and JT stayed at JT's apartment (TR 542). Eli, Daniel, Marcus, Cody and Paul drove back to Jacob's house (TR 517). They parked at the church and Eli, Daniel, Marcus and Cody went to the back door (TR 517, 542). Eli said that Cody kicked in the door and they went into the house (TR 517, 543). The lights were on and it was quiet (TR 518). They saw Jacob and his girlfriend asleep in the bedroom (TR 518-519).

Eli and Daniel started shaking Jacob; they told him to get up and give them the money and drugs that his friend told them about (TR 520, 544). Eli thought Jacob was high (TR 545). Marcus grabbed Jacob's assault rifle and told him not to move (TR 549-550). Jacob got up and stretched (TR 520). Then Daniel shot him (TR 521). Eli said that Jacob was not charging at them (TR 550). Eli testified that he did not have a gun and he did not know that Daniel had a gun (TR 521). He did not know how many times Daniel shot Jacob (TR 521).

After the shooting, everyone ran back to the car at the church (TR 521). According to Eli, Daniel said that it did not matter to him and that "it was just another body" (TR 522). He said that it was not "his first rodeo" (TR 522). Eli also testified that Daniel said he did not know that there was a girl in the bed or he would have killed her too (TR 522).

When they got back to the apartment, Eli said that he told JT what had happened, but JT did not believe him (TR 523, 553). Eli said that JT and Cody went back to Jacob's house because JT did not believe that Jacob was dead (TR 525, 553). Eli denied going

back to Jacob's house the third time; he said that he stayed at JT's and talked to Marcus (TR 525). Cody and JT brought stolen items back to the house (TR 554). Eli denied trying to sell a stolen Kindle to his cousin Rayshawn (TR 554-555).⁹

The next day, Eli, Marcus and Daniel returned to Tulsa (TR 526). Eli said that he saw himself on the Internet after he got back to Tulsa (TR 527). Daniel told Eli and Marcus that he knew who to look for if his name came up (TR 528).

Eli testified pursuant to a plea agreement; he agreed to plead guilty to second degree murder and first degree burglary with a fifteen year cap (TR 559). He hoped that he would receive less than fifteen years for cooperating (TR 563).

Marcus Stephens

Marcus was called as a defense witness (TR 584). Eli's mom drove Eli, Marcus and Daniel to Joplin on July 4th (TR 585). She dropped them off at JT's apartment (TR 585). They smoked marijuana, played video games, went to the mall and went swimming with some girls (TR 587).

On the evening of July 5th, they were smoking pot, and taking cough syrup with codeine and Xanax (TR 588). Marcus said nobody was using the drug called "Molly" (TR 588). Around midnight, they woke him up because they wanted to go buy some more marijuana and he had money (TR 589). JT, Eli, Marcus, Cody and Paul all left in

⁹ Rayshawn said that Eli tried to sell him an iPad and a long gun, like an assault rifle, the day after Jacob was killed (TR 630-631).

Paul's car (TR 589). Marcus said that he did not know anything about a plan to rob someone and he did not know that anyone was armed (TR 589).

Marcus said that they parked in a lot behind a church and walked to a house (TR 590). Cody kicked in the door and they went to the bedroom that Jacob was in (TR 591). Marcus said that he took an assault rifle and left the bedroom (TR 591). JT, Eli, Daniel and Cody were in the bedroom (TR 592). Marcus said that as he turned to walk away from the bedroom, he heard six or seven gunshots (TR 592). Everybody came running out of the bedroom and they left the house (TR 592). He saw Eli and Daniel with guns (TR 592).

Later, JT, Cody and Eli left to go back to Jacob's house (TR 593). It was JT's idea (TR 593). JT said he wanted to go back to the house because they did not get the black box (TR 596). Marcus did not go back with them; he stayed at JT's apartment with Daniel (TR 596-597). The others returned with electronics – a computer, iPad and an iPhone (TR 597). Marcus said that he sold the assault rifle to one of Eli's cousins (TR 597). Eli's grandfather drove them back to Tulsa the next day (TR 599).

Johnathan Taylor (JT) – through Harlin “Joel” King

Defense counsel also subpoenaed the fourth co-defendant, JT, to testify (TR 104). The State stipulated that JT was unavailable for trial and that he would invoke the Fifth Amendment and would refuse to testify if called as a witness (TR 104).

Defense counsel then wanted to call Harlin “Joel” King to testify that JT had told him just hours after Jacob's murder that he had shot Jacob and that he had fired three shots (TR 100-102). The State moved in limine to exclude this testimony as hearsay (LF

81-83; TR 100). Defense counsel argued that JT's statements to Joel should be admitted because it was a statement against JT's penal interest, made within twelve hours of the shooting, to a good friend, and that it was reliable (TR 100-101). The State contested the reliability of JT's statement and said it did not completely exonerate Daniel (TR 105). The trial court did not make a ruling before trial on the admissibility of Joel's testimony (TR 109).

After the first day of trial, the trial court revisited the issue of JT's confession to Joel that he was the shooter (TR 347-350). After further argument, the trial court ruled that it would exclude the testimony because it did not feel that there was corroborating evidence and that King did not believe what JT told him (TR 349). The trial court allowed defense counsel to make an offer of proof (TR 349).

Offer of Proof – Harlin “Joel” King

Joel is friends with JT (TR 613). They went to school together and he saw JT on a regular basis, at least once a week (TR 614). They played basketball together. They communicated through cell phone and text messages (TR 614).

In the early morning of July 6, 2012, JT called Joel 20-30 times, starting around 2:00-3:00 a.m. (TR 615). JT wanted Joel to pick him up (TR 615). Joel picked up JT and another guy; he took the other guy to a “head shop” on Main Street (TR 616). After that, Joel and JT drove around (TR 616). JT was “freaking out” and he was “scared” (TR 617). JT brought up what had happened – he said that he was the person who shot Jacob three times (TR 617). JT explained that they went into Jacob's house trying to get “Molly” and that the robbery went wrong (TR 617). JT said Jacob was shot because he

was getting out of bed and that he fired three times (TR 617-618). Joel did not know if he believed JT or not (TR 619), but he believed him enough to go to the police and tell them what JT had said to him about shooting Jacob (TR 620). Joel went to the police because he did not feel it was right to kill somebody over a little bit of drugs (TR 620).

At the conclusion of the offer of proof, the trial court ruled that Joel's testimony would not be allowed (TR 621). Defense counsel renewed his objection that this ruling denied Daniel his right to due process and to present a defense (TR 622).

During the State's closing argument, the prosecutor told the jury:

The first thing, it was told to you that you would hear that Jonathan

Taylor had the pistol and went in the house and shot Mr. Wages

when he was rushed. You haven't heard that evidence because it has

never been presented today.

(TR 660).

Defense counsel argued in closing that the witnesses were not being honest about who was the shooter, and that they may have been covering for their brother and friend, JT, who was the real shooter (TR 682-688). Counsel argued that there is an equal or more likely inference that JT was the shooter, and that everything the witnesses said Daniel did, JT actually did (TR 687). The prosecutor objected that there was no evidence presented that JT was the shooter (TR 687). The trial court overruled the objection (TR 688).

In the State's rebuttal closing argument, the prosecutor reminded the jury that they had seen everyone that went into that bedroom, except JT (TR 697).

During its deliberations, the jury asked “what is the difference from first-degree and second-degree sentence?” (TR 704). The jury found Daniel guilty of first degree murder (Count I), armed criminal action (Count II) and first degree burglary (Count III) (TR 717-718; LF 107-109).

Because Daniel was a juvenile at the time of the crime, the jury first had to decide whether life without parole for first degree murder was appropriate for him (LF 114-115). During this first sentencing phase, Daniel testified and maintained his innocence (TR 779). He apologized to Jacob’s family that they had to go through this, but that he did not cause the death of their son (TR 779). He said that he came to Joplin with the wrong people, but he never went to Jacob’s house that night (TR 780). He went to sleep at 2:00 a.m., very intoxicated (TR 780). Whatever the others did was without his knowledge; he never saw Jacob and he had nothing to do with his murder (TR 780).

After deliberating, the jury was unable to decide or agree that life without the possibility of parole was the appropriate punishment for Daniel (TR 793; LF 125). Therefore, under the procedure set forth by this Court,¹⁰ the trial court declared Section 565.020 void as it related to Daniel, in that it failed to provide a constitutionally valid punishment for the crime it purports to create (TR 793). The Court vacated the jury’s verdict of first degree murder and found Daniel guilty of second degree murder under Section 565.021.1(1) (TR 794). It also vacated the armed criminal action count and entered a conviction for armed criminal action based on second degree murder (TR 794).

¹⁰ *State v. Hart*, 404 S.W.3d 232, 243 (Mo. banc 2013).

The jury then heard evidence and deliberated upon Daniel's sentence for second degree murder, armed criminal action and first degree burglary (TR 797-833). The jury returned sentencing verdicts recommending two life sentences and fifteen years, respectively (TR 835; LF 126-127). The trial court accepted these verdicts, imposed them, and ordered them to run concurrently (TR 849; LF 145-146).

Daniel filed a timely notice of appeal in the Missouri Court of Appeals, Southern District (LF 147-150). After that court issued an opinion, this Court transferred Daniel's case pursuant to Rule 83.04. This appeal follows.

POINTS RELIED ON

I.

The trial court abused its discretion and committed reversible error in excluding the testimony of Harlin “Joel” King that his friend, JT, had admitted to shooting Jacob three times on the night in question, because the exclusion of this statement denied Daniel his right to due process of law, a fundamentally fair trial, and to present a defense, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Art. I, §§ 10 & 18(a) of the Missouri Constitution, in that JT’s confession to Joel that he shot Jacob was an admission against interest made shortly after the murder, to a close friend, and it was sufficiently reliable to be admissible hearsay, and provided a defense which, if believed, would have resulted in an acquittal of the charged offense.

Chambers v. Mississippi, 410 U.S. 284 (1973);

State v. Stewart, 313 S.W.3d 661 (Mo. 2010);

State v. Carroll, 629 S.W.2d 483 (Mo. App. W.D. 1981);

U.S. Const., Amends 6 & 14;

Mo. Const., Art. I, Sections 10 & 18(a); and

Rule 29.11.

II.

The trial court plainly erred in letting the State argue in closing that the jury heard no evidence that Jonathan Taylor shot Jacob “because it has never been presented today,” in violation of Daniel’s rights to due process of law and a fair trial by a fair and impartial jury as guaranteed by the 5th, 6th and 14th Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that Daniel wanted to present evidence that JT shot Jacob, and he tried to present such evidence through the testimony of Harlin “Joel” King that JT had confessed his involvement in the shooting shortly after it happened, but the trial court sustained the State’s hearsay objection and excluded this evidence. Urging the jury to infer an adverse inference from the absence of evidence which was excluded on the State’s motion resulted in manifest injustice.

State v. Hammonds, 651 S.W.2d 537 (Mo. App. E.D.1983);

State v. Weiss, 24 S.W.3d 198 (Mo. App. W.D. 2000);

State v. Williams, 119 S.W.3d 674 (Mo. App. S.D. 2003);

U.S. Const., Amends 6 & 14;

Mo. Const., Art. I, Sections 10 & 18(a); and

Rule 30.20.

ARGUMENT

I.

The trial court abused its discretion and committed reversible error in excluding the testimony of Harlin “Joel” King that his friend, JT, had admitted to shooting Jacob three times on the night in question, because the exclusion of this statement denied Daniel his right to due process of law, a fundamentally fair trial, and to present a defense, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Art. I, §§ 10 & 18(a) of the Missouri Constitution, in that JT’s statement was an admission against interest made shortly after the murder, to a close friend, and it was sufficiently reliable to be admissible hearsay, and provided a defense which, if believed, would have resulted in an acquittal of the charged offense.

Three of Daniel’s co-defendants testified at trial. Their testimonies were inconsistent and conflicted with each other. The theory of defense was that the co-defendants and Brittany were covering for JT – their brother, friend and boyfriend – by implicating Daniel as the shooter. Defense counsel subpoenaed JT, the fourth co-defendant, to testify (TR 104). The State stipulated that JT was unavailable for trial and that he would invoke the Fifth Amendment and would refuse to testify if called as a witness (TR 104).

Defense counsel then tried to call Harlin “Joel” King to testify that JT had told him just hours after Jacob’s murder that he had shot Jacob and that he had fired three

shots (TR 100-102). The State moved in limine to exclude this testimony as hearsay (LF 81-83; TR 100). Defense counsel argued that JT's statement to Joel should be admitted because it was a statement against JT's penal interest, made within twelve hours of the shooting, to a good friend, and that it was reliable (TR 100-101). The State contested the reliability of JT's statement and said it did not completely exonerate Daniel (TR 105).

After the first day of trial, the trial court revisited the issue of JT's confession to Joel that he was the shooter (TR 347-350). After further argument, the trial court ruled that it would exclude the testimony because it did not feel that there was corroborating evidence and that King did not believe what JT told him (TR 349). The trial court allowed defense counsel to make an offer of proof (TR 349).

Offer of Proof – Harlin “Joel” King

Joel is friends with JT (TR 613). They went to school together and he saw JT on a regular basis, at least once a week (TR 614). They played basketball together. They communicated through cell phone and text messages (TR 614).

In the early morning of July 6, 2012, JT called Joel 20-30 times, starting around 2:00-3:00 a.m. (TR 615). JT wanted Joel to pick him up (TR 615). Joel picked up JT and another guy; he took the other guy to a “head shop” on Main Street (TR 616). After that, Joel and JT drove around (TR 616). JT was “freaking out” and he was “scared” (TR 617). JT brought up what had happened – he said that he was the person who shot Jacob three times (TR 617). JT explained to Joel that they went into Jacob's house trying to get “Molly” and that the robbery went wrong (TR 617). JT said Jacob was shot because he was getting out of bed and that he fired three times (TR 617-618).

Joel went to the police to tell them that JT had confessed to shooting Jacob (TR 620). He went to the police because he did not feel it was right to kill somebody over a little bit of drugs (TR 620).

Preservation and Standard of Review

At the conclusion of the offer of proof, the trial court granted the State's motion and excluded Joel's testimony (TR 621). Defense counsel raised this ruling as error in Daniel's motion for new trial, and filed a memorandum in support of the motion for new trial, specifically addressing this issue of the exclusion of Joel's testimony (LF 129-130, 132-144). Therefore, it is preserved for review. *Rule 29.11(d)*.

Trial courts have broad discretion in ruling on the admission or exclusion of evidence at trial. *State v. Bryan*, 60 S.W.3d 713, 718 (Mo. App. S.D. 2001). Absent a clear abuse of discretion, the trial court's ruling will not be disturbed. *Id.* Such abuse of discretion occurs when the trial court's evidentiary ruling is clearly against the logic of the circumstances before the court, and is so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful deliberate consideration. *State v. Anglin*, 45 S.W.3d 470, 472 (Mo. App. W.D. 2001). Further, in matters involving the admission of evidence, review is for prejudice, not mere error, and this Court will reverse only if the error was so prejudicial that it deprived the defendant of a fair trial. *Id.* (quoting *State v. Harrison*, 24 S.W.3d 215, 218 (Mo. App. W.D. 2000)).

Analysis

The Due Process Clause of the Fourteenth Amendment mandates that the defendant in a criminal case be allowed to present confessions or inculpatory statements by third parties, notwithstanding the fact that such statements are hearsay and that the declarant is unavailable. *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038 (1973). Because the hearsay rule was designed to exclude unreliable testimony, the statements must bear sufficient indicia of reliability. *Id.* at 300-301.

In *Chambers*, a police officer, Liberty, was killed. *Id.* at 285. Prior to being killed, Liberty fired several shots into an alley, with a bullet striking defendant Chambers. *Id.* at 286. At trial, a deputy sheriff testified that he was standing near Liberty and that he saw Chambers shoot Liberty. *Id.* Another deputy testified that he saw Chambers “break his arm down” shortly before shots were fired. *Id.* Liberty was shot with a .22 caliber firearm. *Id.* at 286. Chambers asserted his innocence throughout the court proceeding. *Id.* at 287.

Gable McDonald was present during the shooting. *Id.* at 287. After McDonald talked to Reverend Stokes, McDonald made a sworn confession to Chambers’ attorneys that he shot Liberty. *Id.* McDonald stated that he used his own gun, a .22 caliber revolver, which he discarded after the shooting. *Id.* McDonald also told the attorneys that he confessed to James Williams. *Id.* McDonald was taken to jail. *Id.* at 288.

One month later, at a preliminary hearing, McDonald repudiated his prior sworn written confession. *Id.* at 288. McDonald said Reverend Stokes persuaded him to confess by telling him that he would not be imprisoned and that McDonald could share in

any monies that Chambers received in a lawsuit. *Id.* McDonald was released from custody without any further investigation. *Id.*

During Chambers' trial, there was no proof that Chambers owned a .22 caliber firearm. *Id.* at 288. Chambers attempted to introduce evidence that McDonald confessed to the crime on four separate occasions, once when he gave a sworn statement to Chambers' counsel, and on three other occasions to three different friends. *Id.* at 289. However, the trial court strictly applied Mississippi's hearsay rule to forbid the friends from testifying about McDonald's confessions to them. *Id.* at 292-293.

The United States Supreme Court reversed. It noted three reasons that the statements in that case were admissible statements against the penal interest of the unavailable witness: (1) each confession was "in a real sense self-incriminatory and unquestionably against interest"; 2) each statement was spontaneously made to a close acquaintance shortly after the crime; and 3) the statements were corroborated by other evidence in the case. *Chambers*, 410 U.S. at 300. In *Chambers*, the Court found the statements to be sufficiently reliable, and ruled that the Due Process Clause of the United States Constitution mandated the admission of the statements. *Id.* at 302.

Chambers has been adopted in Missouri. *State v. Stewart*, 313 S.W.3d 661, 666 (Mo. banc 2010); *State v. Blankenship*, 830 S.W.2d 1 (Mo. banc 1992). Under Missouri law, where due process requires such statements, confessions to murder will be admitted if: (1) the declarant is unavailable as a witness; (2) the statement, if true, would exonerate the defendant; and (3) the statement carries sufficient indicia of reliability. *State v. Robinson*, 90 S.W.3d 547, 553 (Mo. App. S.D. 2002). The three indicia of reliability

from *Chambers* are also used in Missouri; again they are: (1) the statement must be self-incriminatory and undeniably against self-interest; (2) the statement must be made spontaneously to a close acquaintance shortly after the crime; and (3) the statement must be corroborated by other admissible evidence. *Id.*

JT's Statement to Joel was Inculpatory and Against Self-Interest

Without question, JT's statement to Joel was against his self-interest. He told Joel that he shot at Jacob three times, killing him, during a robbery (TR 613-620). JT admitted to the murder, and at the time of his admission he was conscious of his guilt. JT was "freaking out" and he was "scared" (TR 617).

The statement was made to a close friend

Joel and JT are friends (TR 613). They went to school together and Joel continued to see JT on a regular basis, at least once a week (TR 614). They played basketball together. They communicated through cell phone and text messages (TR 614). In the early morning of July 6, 2012, JT called Joel 20-30 times, starting around 2:00-3:00 a.m., looking for a ride (TR 615). Under *Chambers*, these statements should be considered to have a high indicia of reliability. *Chambers*, 410 U.S. at 300-1.

JT's Account of the Incident was Corroborated by Evidence

In several important aspects JT's statements to Joel were corroborated by other evidence. JT told Joel that he shot Jacob three times when he got out of bed while they were robbing his house (TR 617-618). Cody said that it was JT's idea to commit the robbery (TR 473). The .22 caliber gun belonged to JT (TR 402). Cody had seen JT with the gun at the JT's apartment (TR 402). Three, and only three, .22 caliber bullets were

found in the bedroom (TR 315, 330-331). Marcus testified that there were six or seven gunshots (TR 592), Eli did not remember how many gunshots there were (TR 521), and Cody and Marcus stated that Eli and Daniel were both shooting (TR 406, 592). Cody said that Eli had a nine millimeter handgun (TR 402). Eli denied having a gun (TR 521). No nine millimeter bullets or shell casings were found (TR 315, 330-331). Only JT's confession to Joel corroborates the physical evidence – that he shot at Jacob three times (TR 617-618). Three bullets from JT's gun were found in the bedroom (TR 315, 330-331).

All three State's witnesses had motive to protect JT by implicating Daniel as the shooter. At the time of the shooting, Brittany was JT's girlfriend and she was pregnant with his twins (TR 494). Eli is JT's brother (TR 506). And Cody was one of JT's best friends (TR 391). Additionally, Cody testified during direct examination that the morning after the shooting, a cousin of JT's came to the apartment and asked JT, "why did you kill him?" (TR 412). All of this corroborates JT's confession to killing Jacob, which should have been admitted.

The Statements were Admissible

JT's confession should have been admitted into evidence because it had sufficient indicia of reliability. He told Joel that he shot Jacob three times while he was getting out of bed during the robbery (TR 617-618). This account was consistent with the physical evidence and with some testimony of other co-defendants. The confession was made to good friend within hours of the murder. And JT's confession to Joel was clearly and unquestionably against his self-interest. He admitted to being the person who shot Jacob

three times. If this were true, then Daniel was not the shooter and could not have been charged or convicted of first degree murder.

JT's confession meets all of the criteria set forth in *Chambers*. It is corroborated by substantial evidence of other witnesses and by physical evidence. It clearly inculpatates JT and exculpates Daniel of first degree murder. JT's statement had indicia of reliability that warranted its admission and consideration by the jury.

JT's confession is distinguishable from the statements properly excluded in *State v. Turner*, 623 S.W.2d 1, 9 (Mo. banc 1981), where the proffered statement, even if true, would not exonerate the defendant, because in *Turner*, the defendant admitted to acting with the declarant in committing the crime. In this case, Daniel never admitted to committing the crime, he made no statements to police, and he maintains his innocence.

In *State v. Phillips*, 940 S.W.2d 512 (Mo. banc 1997), the trial court excluded hearsay from the penalty phase in a capital murder trial. *Id.* at 517. The defendant's son told a friend that he had dismembered the victim's body. *Id.* at 516. This Court found that because the statements had been made spontaneously to a social acquaintance, and were corroborated by some of the State's evidence, they were sufficiently reliable to be allowed into evidence. *Id.* at 518.

In *State v. Carroll*, 629 S.W.2d 483 (Mo. App. W.D. 1981), the defendant attempted to show that another man had admitted to his cell mate in the local jail that he had committed the robbery, and that Carroll had nothing to do with the offense. *Id.* at 485. Applying the *Chambers* test for reliability, the court found that the statements were sufficiently reliable because they were corroborated by some of the defense evidence. *Id.*

at 486-87. The fact that the admissions were made to a cellmate rather than a close acquaintance did not defeat their admissibility. *Id.* The court pointed out that “[o]f course the jury need not believe any of that testimony; but nevertheless the jury was entitled to hear the declaration and give it appropriate consideration.” *Id.* at 486.

In *State v. Stewart*, 313 S.W.3d 661 (Mo. banc 2010), the discovery of new evidence that another person made incriminating statements about committing the murder, required a new trial under the *Chambers* analysis. A detective stated that, after Stewart’s trial, he had received a tip that Tim had disclosed to his brother that he had “taken someone’s life.” *Id.* at 664. Tim did not indicate whose life he took, but his brother stated that he had not taken Tim’s statements seriously until after he heard about the bloody hat found by the Victim’s body. *Id.* The brother stated it was Tim’s hat or a hat identical to the one Tim had for a long period of time. The brother also indicated that Tim drove a light tan or white vehicle. *Id.*

Tim’s nephew also testified at the motion hearing. *Id.* at 665. The nephew testified that Tim had confided to him the morning after Victim’s murder that Tim and his friend, John Mills, were at Victim’s house when Victim was killed. *Id.*

Stewart argued that the credibility of Tim’s alleged statements to his brother and nephew were bolstered by the fact that the DNA evidence on the bloody hat was confirmed after trial as a match to Tim. *Id.* He also asserted that the confirmed DNA evidence would have altered the jury’s view of his case, as it would have obviated the prosecutor’s closing arguments that the DNA evidence showed a “hit” but not a “match” to Tim. *Id.*

This Court held that the circumstances under which Tim's alleged statements were made lent credence to their credibility: Tim's purported statements to his nephew about his presence at the crime scene were made the day after Victim's murder and were corroborated by Tim's DNA being found on the bloody hat at the crime scene; Tim's purported statements to his brother were uttered shortly after Victim's murder and were made spontaneously in the context of the brothers' conversation about family issues. *Id.* at 666. The Court ordered a new trial, where the evidence would be admissible. *Id.* at 667.

Daniel is also entitled to show and argue that JT had, in fact, confessed to his friend Joel that he had shot and killed Jacob, and had given details that were consistent with other evidence in the case. His confession meets all the requisite criteria, and the trial court erred in excluding it.

The exclusion of JT's confession genuinely prejudiced Daniel. The defense theory was that JT was the shooter and that the other co-defendants were covering for JT because JT was Eli's brother and Cody's best friend. This case boiled down to the word of three co-defendants who all had deals with the state for significantly reduced sentences for second degree murder, and JT's former girlfriend, the mother of his children. Yet, none of their stories matched. The only consistent story among them was that they each put JT's gun in Daniel's hand, rather than JT's hand.

The court in *Carroll* held that reversal was mandated because it was a "close case." *Id.* This case, also, is a close case. JT's account was just as likely, if not more so, than that given by Eli, Cody, or Marcus. Had the jury been able to hear that JT had

implicated himself in pulling the trigger, the evidence would likely have altered the outcome of this case. It is likely that Daniel would not have been convicted of first degree murder in the first instance, or not sentenced to a more lengthy life sentence for second degree murder, given that he was not the shooter.

In *Green v. Georgia*, 442 U.S. 95 (1979), the Supreme Court, on due process grounds, reversed a death sentence because the trial court excluded an accomplice's confession that he, rather than the defendant, had pulled the trigger. The evidence showed that Green and an accomplice had raped the victim after abducting her. *Id.* at 96. The victim was murdered, and both Green and his accomplice were convicted of her murder. *Id.* There was no direct evidence indicating which of the two men had murdered the victim; however, the accomplice had told a close friend that he killed the victim by himself after sending Green out on an errand. *Id.* This testimony was used at the accomplice's trial to impose the death penalty. *Id.* At Green's trial, however, the testimony was excluded as inadmissible hearsay. *Id.* Green cited *Chambers*, affirming that “the hearsay rule may not be applied mechanistically to defeat the ends of justice.” *Green*, 442 U.S. at 97 (citing *Chambers*, 410 U.S. at 302). In *Green*, if the jury had known that Green's accomplice had pulled the trigger, it may have not imposed death, even if they believed that Green was present at the crime, and guilty of accessory liability as to the murder.

Similarly, here, if the jury had known that JT had pulled the trigger and had fired all three of the bullets that were found in the house, it may not have found that Daniel deliberated, and thus was not guilty of accessory liability for first degree murder.

Further, had the jury known that JT, alone, fired the shots, it may have believed the defense argument that the other witnesses were covering for JT and that Daniel was not present at all.

And beyond the guilt phase implications, evidence of JT's confession to being the lone shooter would have been mitigating in Daniel's sentencing phase. Indeed, the jury had already made a finding that life imprisonment without parole was not appropriate for Daniel, who was seventeen at the time of the incident; if the jury also knew that JT, alone, fired the shots, including the one that killed Jacob, it may have found Daniel even less culpable at sentencing.

The trial court's error prejudiced Daniel and violated his rights to a fair trial, to due process of law, and to present a defense, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution. This Court must, therefore, reverse Daniel's convictions and remand for a new trial.

II.

The trial court plainly erred in letting the State argue in closing that the jury heard no evidence that Jonathan Taylor shot Jacob “because it has never been presented today,” in violation of Daniel’s rights to due process of law and a fair trial by a fair and impartial jury as guaranteed by the 5th, 6th and 14th Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that Daniel wanted to present evidence that JT shot Jacob, and he tried to present such evidence through the testimony of Harlin “Joel” King that JT had confessed his involvement in the shooting shortly after it happened, but the trial court sustained the State’s hearsay objection and excluded this evidence. Urging the jury to infer an adverse inference from the absence of evidence which was excluded on the State’s motion resulted in manifest injustice.

As discussed in Point I, *supra*, Daniel’s defense to the first degree murder charge was that someone else had shot Jacob Wages, namely, JT. Daniel challenged the wildly different accounts of Cody, Eli and Marcus about what happened before, during and after the shooting, asserting that they were covering for JT (Eli’s brother and Cody’s good friend). However, the defense also wanted to present testimonial evidence that JT had actually confessed to Harlin “Joel” King, shortly after the murder, that he had shot Jacob Wages three times.

Defense counsel subpoenaed JT to testify (TR 104). The State stipulated that JT was unavailable for trial and that he would invoke the Fifth Amendment and would

refuse to testify if called as a witness (TR 104). Defense counsel then wanted to call Harlin “Joel” King to testify that JT had told him just hours after Jacob’s murder that he had shot Jacob and that he had fired three shots (TR 100-102). The State moved in limine to exclude this testimony as hearsay (LF 81-83; TR 100). Defense counsel argued that JT’s statement to Joel should be admitted because it was a statement against JT’s penal interest, made within twelve hours of the shooting, to a good friend, and that it was reliable (TR 100-101). Ultimately, the trial court ruled that it would exclude the testimony because it did not feel that there was corroborating evidence and that King did not believe what JT told him (TR 349).

Yet, after successfully excluding Joel’s testimony about JT’s confession, the State then argued to the jury that “it was told to you that you would hear that Jonathan Taylor had the pistol and went in the house and shot Mr. Wages when he was rushed. You haven’t heard that evidence because it has never been presented today” (TR 660).

Preservation and Standard of Review

Because counsel did not object to the State’s argument, review is for plain error. *State v. Gray*, 887 S.W.2d 369, 387 (Mo. banc 1994); **Rule 30.20**. Plain error relief is appropriate when the alleged error so affects the rights of the defendant as to cause a manifest injustice or miscarriage of justice. *State v. Weiss*, 24 S.W.3d 198, 202 (Mo. App. W.D. 2000).

Analysis

It is well-settled in Missouri that it is error for a prosecutor to "comment on or refer to evidence or testimony that the court has excluded." *State v. Hammonds*, 651

S.W.2d 537, 539 (Mo. App. E.D.1983); *State v. Weiss*, 24 S.W.3d at 202 -204. Whether that error requires reversal depends on the circumstances of the particular case, and particularly on the strength of the other evidence and whether the prosecutor intentionally misrepresented the facts in making the comment. *Hammonds*, 651 S.W.2d at 539; *State v. Roberts*, 838 S.W.2d 126, 131 (Mo. App. E.D. 1992). Even where, as here, the error was not properly preserved, Missouri courts have found that such intentional misconduct constitutes manifest injustice mandating reversal. *Weiss*, 24 S.W.3d at 202; *Hammonds*, 651 S.W.2d at 539, citing, *State v. Williams*, 646 S.W.2d 107 (Mo. banc 1983).

In *State v. Luleff*, 729 S.W.2d 530 (Mo. App. E.D. 1987), the defendant was charged with receiving stolen property. At trial, the defendant attempted to introduce into evidence a receipt for the sale of the property. *Id.* at 535. The prosecutor objected to the receipt as hearsay, and upon the defendant's subsequent effort to get the receipt into evidence under the business records exception, the prosecutor objected again. *Id.* These objections were sustained by the trial court. *Id.*

Then, in closing argument the prosecutor stated:

PROSECUTOR: *Where's the receipt?*

DEFENSE: Objection again, Judge. He objected to the receipt.

THE COURT: Overruled.

PROSECUTOR: It's easy to say how he did it and so on. It's convenient if you're lying to tell you that, but you are supposed to make this decision based on facts and evidence. *Well, where's the receipt?*

Id. at 536 (emphasis added). On rebuttal, the prosecutor continued:

PROSECUTOR: Another thing--seven thousand eight hundred dollars cash, *no receipt*. And, how did we learn that? Did any of the State's witnesses say that? No, because we don't know how he got the tractor. The only person who knows, ladies and gentlemen, is this man right here. So, are you bound by what he told you up here? Are you bound that that is when he got it, that that is what he paid for it and that's how he got it? No, you twelve people can decide whether he's telling the truth and would he want to say that and why would he say that ... *there is a catch. "Did you get a receipt? No." So, are you bound by his testimony? I think not.*

Id. (emphasis added).

Thus, in *Luleff*, although the prosecutor knew that the defendant had a piece of paper he claimed was a receipt for the purchase of the stolen property he was charged with possessing, which the prosecutor had successfully caused to be excluded, the prosecutor represented to the jury that if it had existed defendant would have produced it, yet he did not do so. *Id.* at 536. Indeed, "[t]he comments were tantamount to an absolute denial of the existence of any such document. The remarks were not accidental, but were deliberate." *Id.*

In *Hammonds*, *supra*, the defendant was accused of robbery. He sought to endorse his uncle as an alibi witness on the morning of trial. *Id.*, 651 S.W.2d at 538. The State's objection to the late endorsement was sustained and the defendant was not permitted to call his uncle as a witness. *Id.* This occurred out of the presence of the jury.

Id. The defendant testified at trial that he was not guilty because he was with his uncle and other persons at the time of the crime. *Id.* In closing argument, the State attacked the defendant's alibi by noting that the defendant's uncle had been in the courtroom during the trial, but the defendant did not call his uncle as an alibi witness at trial. *Id.* at 538-539.

The Eastern District reversed Hammonds' conviction because, "it is [] well settled that in Missouri it is improper for a prosecutor to comment on or refer to evidence or testimony that the court has excluded." *Id.* at 539. The Court again noted that the State's comment was deliberate, had misrepresented the facts, "and cannot be excused." *Id.* The Court granted plain error relief to correct the manifest injustice. *Id.*

The Western District also granted plain error relief for a similar closing argument in *State v. Weiss, supra*. Weiss was charged with stealing, and at trial, he attempted to introduce evidence that he had received "buy-out" money when he retired, in addition to the funds from his IRA, which he had initially mentioned to police. *Id.*, 24 S.W.3d at 200. He testified that he had deposited this money into his checking account in 1994, and that he had believed that this was the money he was accessing in 1997. *Id.* He then attempted to introduce documentation that he had received "buy-out" money in 1994. *Id.* The State successfully objected to introduction of this evidence on the basis of late disclosure and hearsay. *Id.* at 200-201.

As in *Hammonds*, the prosecutor then proceeded to make positive misrepresentations to the jury that the documents showing Weiss received buy-out money did not exist. *Id.* at 203. The prosecutor knew that Weiss had tried to introduce the

documents but he had successfully argued that they should be excluded, and then he stated in closing argument:

He isn't sure of the amount, *there's no deposit slip, there are no bank statements, not a single witness. The bank has no record, the Department of Defense has no record. The defense has actually shown you not one single record, no payroll record, nothing, to show that this other money even ever existed. Maybe it didn't.*

Id. at 203-204 (emphasis added).

The Western District found that the intentional and deliberate nature of the prosecutor's misstatements in *Weiss*, and their prejudicial effect, was clearly on par with those in *Luleff* and *Hammonds*. *Id.* at 204. It could not say “that this distasteful tactic did not affect the verdict, for had the jury believed Defendant's claim that these funds provided an alternate source for the money he claimed he thought he was withdrawing, it might have acquitted him.” *Id.*

The Southern District also reversed for plain error in *State v. Williams*, 119 S.W.3d 674 (Mo. App. S.D. 2003), for a similar argument. Although the prosecutor knew that Williams had attempted to introduce evidence in the form of the tape-recording that his ex-wife had received child support from him in addition to welfare from the State, only to have it excluded at the prosecutor's instigation, the prosecutor nonetheless stated in closing that:

[F]or all of the talk about welfare fraud, they were not able to produce one shred of evidence to show a receipt that was improperly credited. Not one

receipt in a month where [ex-wife] got the money in addition to a payment from the State of Missouri. Not one ... Now they want to say [ex-wife] has a motive to be untruthful. There's no evidence of that. *Again, there's not one piece of evidence that shows that the mother in this case, the victim, double dipped, received money from [Appellant] and AFDC money in the same month.* (emphasis added).

Id. at 679-680.

Citing *Weiss*, *Luleff*, and *Hammonds*, the Court determined that the prosecutor made positive misrepresentations to the jury that there was no evidence to support Williams' assertion that his ex-wife had been committing welfare fraud by simultaneously collecting aid from the State and support payments from him. *Id.* at 681. It called the prosecutor's comments during closing argument "deliberate and inexcusable," because he was well aware that the defense had, indeed, attempted to introduce evidence of the ex-wife's welfare fraud, and the prosecutor's "comments were tantamount to an absolute denial of the existence of any such [evidence]." *Id.*, citing *Luleff*, 729 S.W.2d at 536. The prosecutor's argument affected Williams' substantial rights and resulted in manifest injustice. *Id.*

The prosecutor's closing argument here was equally distasteful. The prosecutor knew that Daniel attempted to present JT's confession to shooting Jacob through the testimony of Harlin "Joel" King. That evidence was successfully excluded by the prosecutor. Yet, the prosecutor then argued to the jury that it had not heard any evidence

that JT shot Jacob “because it has never been presented today.” (TR 660). This was only because the State had successfully gotten this evidence excluded.

Because of the manifest injustice that occurred when the trial court failed to *sua sponte* prevent the State from urging the jury to draw an adverse inference from the absence of evidence which was excluded on the State’s motion, Daniel’s conviction must be reversed and the cause remanded for a new trial.

CONCLUSION

Because the trial court erred in excluding testimony that JT confessed to shooting Jacob (Point I), and because the trial court plainly erred in allowing the State to then argue to the jury that they had not heard any evidence that JT shot Jacob (Point II), this Court should reverse Daniel's convictions and remand for a new trial.

Respectfully submitted,

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Certificate of Compliance and Service

I, Amy M. Bartholow, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2010, in Times New Roman, size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains **9,960** words, which does not exceed the 31,000 words allowed for an appellant's brief.

On this 8th day of September, 2015, electronic copies of Appellant's Brief and Appellant's Brief Appendix were placed for delivery through the Missouri e-Filing System to Dora Fichter, Assistant Attorney General, at Dora.Fichter@ago.mo.gov.

/s/ Amy M. Bartholow

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